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## ELECTION COMMISSION, INDIA

NOTIFICATION

*New Delhi, the 24th December 1953*

**S.R.O. 59.**—Whereas the election of Shri Gopi Ramji Thete, as a member of the Legislative Council of the State of Bombay from the Nasik Local Authorities constituency of that Assembly has been called in question by an Election Petition duly presented under Part VI of the Representation of the People Act, 1951 (XLIII of 1951), by Shri Maniklal Amolakchand Bhatewara of House No. 972, Bohorpatti, Nasik City, Bombay State;

And whereas, the Election Tribunal appointed by the Election Commission, in pursuance of the provisions of Section 86 of the said Act, for the trial of the said Election Petition has, in pursuance of the provisions contained in section 103 of the said Act, sent a copy of its Order to the Commission;

Now, therefore, in pursuance of the provisions of Section 106 of the said Act, the Election Commission hereby publishes the said Order of the Tribunal.

ELECTION PETITION No. 2 OF 1953.

CORAM

1. Shri V. A. Naik, B.A. (Hons.), LL.B., *Chairman.*
2. Shri R. D. Shinde, B.A, LL.B., } *Members.*
3. Shri G. P. Murdeshwar, B.A., LL.B., }

In the matter of the Representation of the People Act, 1951,

And

In the matter of the Representation of the People (Conduct of Elections and Election Petitions) Rules, 1951,

And

In the matter of the Election Petition presented thereunder by Shri Maneklal Amolakchand Bhatewara.

Bhatewara, Maneklal Amolakchand, residing at House No. 972, Bohorpatti, Nasik City, Taluka Nasik, District Nasik, State of Bombay—*Petitioner.*

*Versus*

1. Thete, Gopal Ramji, residing at Girnare, Taluka Nasik, District Nasik.
2. Sharma, Shivlal Nenuram, residing in Lonargalli, Ravivar Peth, Nasik City, Taluka Nasik, District Nasik.
3. Kale, Vithal Shriram, residing in Municipal House No. 205, Bhase Lane at Sinnar, Taluka Sinnar, District Nasik.

4. Durve, Anant Govind, residing in Municipal House No. 489, Sinnar, Taluka Sinnar, District Nasik.

5. Bhangare, Ramchandra Namdev, residing at Shinde, Taluka Nasik, District Nasik—*Respondents.*

Counsel Shri Pardiwala for the petitioner. Shri C. K. Gadgil and Shri B. C. Gadgil for Respondent No. 1. Shri R. B. Vispute and Shri V. K. Paranjpe for Respondent No. 2.

Respondents Nos. 3, 4 and 5 absent.

JUDGMENT

The petitioner was a candidate for the bye-election to the Bombay State Legislative Council from the Nasik Local Authorities' Constituency, which was held on 28th January 1953. Three nomination papers were filed by the Petitioner, one by Respondent No. 2, three by Respondent No. 3 and one each by Respondents Nos. 4 and 5. Respondent No. 1 filed one nomination paper on 18th December 1952 and another on 19th December 1952. The Returning Officer accepted one of the nomination papers of the Petitioner, one of the nomination papers of the Respondent No. 1 and the nomination papers of the Respondents No. 4 and 5. He however rejected all the nomination papers of Respondent No. 3. Thereafter Respondents Nos. 4 and 5 withdrew their candidatures before the date appointed for such withdrawal. In the result the election was contested by the Petitioner and Respondents Nos. 1 and 2.

On 29th January 1953, Respondent No. 1 was declared duly elected, he having secured 175 votes. The Petitioner and Respondent No. 2 secured 14 and 3 votes respectively.

The Petitioner has challenged the election in this petition on the following grounds:

(a) The said Returning Officer erred in rejecting all the three Nomination Papers (Nos. 8, 9 and 10) of the Respondent No. 3 under Section 36(2)(c) of the Representation of the People Act, 1951, on the ground that the proposer and seconder therein have subscribed more Nomination Papers than there were seats to be filled up, *i.e.*, one seat. This rejection of all the three said Nomination Papers is entirely illegal and improper. Having regard to the provisions contained in Section 36, sub-section 7(b) of the Representation of the People Act, 1951, the said Returning Officer should have accepted the first Nomination Paper of the said Respondent.

(b) The said Returning Officer erred in accepting the Nomination Paper (No. 7) of the Respondent No. 2 inasmuch as in items Nos. 7 and 8 of the said Nomination Paper, the said Respondent had not stated the name of the Assembly Constituency in the Electoral Roll of which his name was included or his serial number in the said roll. The said Returning Officer should have rejected the said Nomination Paper of the said Respondent.

(c) The Returning Officer erred in accepting the Nomination Paper (No. 7) of the Respondent No. 2 also inasmuch as the said Respondent was not qualified to be chosen to fill the said seat under the said Act in view of the fact that his name does not appear as a voter in the Assembly Electoral Roll of the Bombay State. The said Returning Officer should have rejected the said Nomination Paper of the said Respondent.

(d) The improper rejection by the said Returning Officer of all the three Nomination papers of Respondent No. 3 and/or the improper acceptance by the said Returning Officer of the Nomination Paper No. 7 of the Respondent No. 2 have/has materially affected the result of the said Election.

The Petitioner prayed on the above grounds that the election of Respondent No. 1 be declared illegal and set aside or in the alternative, that the election be declared to be wholly void.

2. Respondents Nos. 3, 4 and 5 have remained absent. The petitioner has made no claim against them.

3. The Respondent No. 1, who is the principal Respondent, contended that the Returning Officer did not err in accepting the nomination paper of Respondent No. 2; that the election had been contested on party lines; that the Returning Officer had ascertained from each candidate his party affiliation; that the Respondent

No. 1 was a candidate adopted by the Congress which was in a position to command the majority of votes and which in fact did succeed in doing so not merely in this constituency but also in the whole of the District and that neither the rejection of the nomination paper of Respondent No. 3 nor the acceptance of the nomination papers of Respondent No. 2, even if improper, did in fact materially affect the result of the election.

4. The respondent No. 2 denied the allegations of the Petitioner regarding his alleged disqualification to stand as a candidate and contended that the acceptance of his nomination paper by the Returning Officer was not improper and that in any case the acceptance of his nomination paper has neither affected the result of the election nor has prejudicially affected the Petitioner in any way.

5. The written statements had been filed before the Tribunal on the 1st of June 1953, and though there was an informal discussion regarding the issues to be framed and the nature and quantum of the evidence which the Parties intended to lead there was no suggestion or request for allowing any amendment to be made in the petition, as may, in the opinion of the Tribunal, be necessary for the purpose of ensuring a fair and effectual trial of the petition.

6. The Issues were framed on the 27th of June 1953 after a fairly long discussion and an amendment was made to issue No. 7 at the desire of the Petitioner on the 5th September 1953.

7. The questions that we have to decide are:

(1) Whether the Petitioner proves that the nomination papers Nos. 8, 9 and 10 of Respondent No. 3 were improperly rejected by the Returning Officer; or whether the Returning Officer should have accepted any of the said three nomination papers, *viz.* Nos. 8, 9 and 10, first received;

(2) Whether he further proves that the Returning Officer improperly accepted the nomination paper No. 7 of Respondent No. 2 by reason of the fact that items Nos. 7 and 8 in the nomination paper were not properly filled in.

(3) Whether the name of respondent No. 2 is entered as voter in the electoral roll of the Assembly of the Bomaby State.

(4) Whether respondent No. 2 was not qualified to be chosen to fill the seat.

(5) Whether the result of the election has been materially affected by reason of the improper rejection of the nomination papers Nos. 8, 9 and 10 of respondent No. 3.

(6) Whether the result of the election has been materially affected by reason of the improper acceptance of the nomination paper No. 7 of respondent No. 2.

(7) What order including order as to costs?

Our findings are: (1) Yes; the one received first should have been accepted; (2) No; (3) Yes; (4) He was qualified; (5) No; (6) No; (7) As per order below.

8. On the first question we have no hesitation in holding that the contention of the petitioner is right. Section 33(2) of the Representation of the People Act, 1951, provides that any person whose name is registered in the electoral roll of the constituency may subscribe as proposer or seconder as many nomination papers as there are vacancies to be filled *but no more*. In this case the vacancy to be filled was only one and therefore the same proposer and the same seconder could not subscribe more nomination papers than one. In fact however the same persons as proposer and seconder subscribed as many as three forms and the Returning Officer, in view of the words "but no more" thought that the nomination papers were invalid. He apparently did not advert to the further provision in the same connection, namely Section 36(7)(b) which clearly provides that where a person has subscribed, whether as proposer or seconder, a larger number of nomination papers than there are vacancies to be filled, those of the papers so subscribed which have been first received upto the number of vacancies to be filled, shall be deemed to be valid. The contention of the petitioner that the Returning Officer should have accepted one of the three nomination papers nominating respondent No. 3 as a candidate for election is therefore well-founded. Shri Gadgil did not seriously argue against this contention. We answer the first issue in the affirmative.

9. *Issue No.* 2.—The allegation in the petition which has given rise to this issue is contained in paragraph 7(b) of the petition. The objection is in the following terms:

> "The said Returning Officer erred in accepting the Nomination Paper (No. 7) of the respondent No. 2 inasmuch as in items Nos. 7 and 8 of the said nomination paper, the said respondent had not stated the name of the Assembly Constituency in the electoral roll of which his name was included or his serial number in the said roll. The said returning officer should have rejected the said nomination paper of the said respondent."

It is obvious that in the nomination paper No. 7 of respondent No. 2, which is at Ex. 98, in column 7, which requires the description of the constituency in which the candidate's name is enrolled as a voter, respondent No. 2 had stated the name of the constituency as Bombay Legislative Council, Nasik Local Authorities Constituency, and in column 8 he had given his number in that electoral roll as 106. Respondent No. 2 had not in columns 7 and 8 given the name of the constituency of the Legislative Assembly in which his name had been entered as a voter, nor has he given his number in that roll. During the trial, the petitioner led evidence to show that the Election Commission, India, had issued a Press Note dated 24th December 1951 (Ex. 52) in which certain directions had been issued for the guidance of the intending candidates while submitting nomination papers for elections to Legislative Councils. The material part of that Press Note is as under:

> "(1) *Constituency to be mentioned in entries 7 and 8 of the nomination paper:*
>
> Under Section 6(1) of the Representation of the People Act, 1951, a person, in order to be qualified to fill a seat in the Legislative Council of a State, has to be an elector for any Assembly Constituency in that State, and the law does not require that he should be a voter for any Council Constituency. It therefore follows that entries 7 and 8 in the nomination paper of a Council Candidate have to be filled with reference to the Assembly constituency and the roll thereof in which such candidate's name is registered.
>
> (2) *Entries* 1, 10 *and* 14.— In entry 1 of the nomination paper however the name of the particular Council Constituency in which the candidate is seeking election must of course be given. Similarly, in entries 10 and 14 relating to the proposer and seconder also, the serial numbers are to be given with reference to the particular Council Constituency electoral roll where the proposer's and seconder's names are registered. Under the law, the proposer and seconder of a candidate will have to be persons who are registered as voters in the same constituency from which the candidate is seeking election."

Mr. Pardiwalla, learned counsel for the petitioner, has strenuously argued that the nomination paper (Ex. 98) submitted by respondent No. 2 should have been rejected by the Returning Officer inasmuch as in column 7 and 8 respondent No. 2 had not described the constituency of the Legislative Assembly in which respondent No. 2's name as a voter has been included nor was his number in that roll also stated and reliance was placed for this view on the Press Note issued by the Election Commission (Ex. 52) which has been set out above.

10. On behalf of respondent No. 2, it was argued that the contention of the petitioner on this point is not well-founded. It was urged that the form of the nomination paper as is printed in Schedule 2 of the Representation of the People Act, 1951 (page 253 of the Manual of Election Law, issued by the Government of India, Ministry of Law) is a composite one meant for use by intending candidates to several legislative bodies and column 7 of this form refers to the constituency in the electoral roll of which the name of the candidate appears. The nomination paper forms which were issued to candidates who intended to contest a seat for the Bombay Legislative Council from the Local Authorities Constituency of Nasik and which are produced on the record (Exs. 93 to 103), would show, that column 7 is a simple translation of the English equivalent in the model nomination paper given in Schedule 2 of the Representation of the People Act, 1951, and it is not unlikely that persons intending to file nomination papers would understand from the phraseology used in column 7 that all that they have to state in filling that column is to state the particulars of the constituency for the Legislative Council and not necessarily the particulars of the constituency of the Legislative Assembly in which their names have been enrolled as voters and, therefore, so long as respondent No. 2 had entered as against column No. 7 the description of the constituency, *viz.* the Local Authorities Constituency of the Nasik District for the Council,

in which he is admittedly a voter, the omission on his part to state also the particulars regarding the Assembly Constituency in which his name also appears as a voter, need not be considered as a material irrgularity and the Returning Officer was justified in not rejecting the nomination paper on that score. It is true that a clear distinction has not been made in the form of the nomination paper between the eligibility of the candidate as against the eligibility of the proposer and the seconder, as stated in columns 7, 10 and 14. So far as the proposer and the seconder are concerned, in columns 10 and 14 each of them had to give the number of their name in the electoral roll of the special constituency in which a vacancy has to be filled under the provisions of section 33(2) of the Representation of the People Act, 1951. But so far as the candidate himself is concerned, it may be that his name may not have been enrolled as a voter in the special constituency which he intends to contest, as it is not necessary that a candidate should be a voter in the roll of the special constituency. But all that is necessary for his eligibility for being chosen as a candidate is that he is a voter in any constituency of the Assembly. If, however, in addition to his being enrolled as a voter in any constituency of the Assembly, which is a necessary qualification for the candidate to the Legislative Council, he is also enrolled as a voter in the special constituency of the Council, for which he intends to stand as a candidate, the question would be whether his omission to state in column 7 of the nomination paper the particulars of the constituency of the Assembly, in which he is enrolled as a voter, would invalidate the nomination paper when the candidate in question has stated as against column 7 merely the particulars of the special constituency of Council, in which he is enrolled as a voter, and has also stated correctly his number in that roll. This was the main issue for determination before the earlier Nasik Tribunal in Election Petition No. 250 of 1952. In that petition, however, the Returning Officer had rejected the nomination papers not on the ground that the candidates had failed to comply with the provisions of Section 33 of the Act [Section 36(2) (d)] but on the ground of the omission of the candidates to supply to the Returning Officer particulars of the Assembly Constituency and they had not asked for more time for being able to do so. In the present case, the petitioner had not been present at the time of the scrutiny and none of the other candidates had raised the objection which is raised in this petition as against respondent No. 2, nor had the Returning Officer raised such an objection on his motion. The Press Note issued by the Election Commission (Ex. 52), does no doubt contain certain directions issued from the office of the Election Commission for the guidance of candidates to the Legislative Councils in filling in the nomination papers. But the question arise whether this Circular in the form of a Press Note stands on the same footing as a provision in the Representation of the People Act, 1951, or in the rules issued thereunder or whether it is in the nature of a recommendatory direction not having the force of law. No provision of the law was pointed out to us on behalf of the petitioner that the directions issued in the Press Note of the Election Commission have legal sanctity. At most, it may be said that the Returning Officer for whose guidance the Election Commission had circulated the Press Note should have kept these directions in mind at the time when nomination papers are received by them under Section 33(1) of the Representation of the People Act, 1951, and the preliminary examination has to be made by them under sub-clauses (5) and (6) of the same provision. It was argued that in construing the term 'constituency' in column 7 of the nomination paper, it may be noted that Section 19 of the Act states that, unless the context otherwise requires, 'constituency' means a Council of States Constituency or a Parliamentary constituency or an Assembly Constituency or a Council Constituency, for the purpose of Parts IV and V, in which Section 33 and 36 are included. In sub-section (ii) of Section 2 of the Representation of the People Act, 1951 (relating to the interpretation of the words used in the Act), it is stated that, for the purposes of the Act, a Council of States Constituency, a Parliamentary Constituency, an Assembly Constituency, a Council Constituency, a Local Authorities Constituency, a Graduates Constituency and a Teachers Constituency shall each be treated as a constituency of a different class. A Local Authorities Constituency, therefore, is a constituency of a different class. Reading this definition in the light of the wording of Section 19, it is possible to argue that the word "Constituency" used in the nomination form means the Local Authorities Constituency in all the items and no other constituency, though there is some force in the argument of Mr. Pardiwalla for the petitioner that so long as the eligibility of the candidate to be chosen to contest a Council seat depends, among other things, upon his being a voter in the Assembly Constituency, that qualification has to be stated in column 7. But when we have in the nomination paper itself, what may appear to be a comprehensive phraseology—and this is strengthened by reference to the words used "in the electoral roll of the Constituency of which he is the Returning Officer" in sub-clause (6) of Section 33 of the Act— a Candidate might while filling this column, enter particulars of the special constituency of the Council and his number therein, if he is in fact a voter in that roll and the Returning Officer might then satisfy himself in a summary inquiry to be held under Section

33(6) that the candidate was in fact enrolled as a voter in any Assembly Constituency roll and was thus eligible to stand as a candidate. Mr. Pardiwalla in advancing his argument on this point had referred to the provision of Sub-clause (5) of Section 33 of the Representation of the People Act, 1951. That rule is as follows:—

> "On the presentation of a nomination paper, the Returning Officer shall satisfy himself that the names and electoral roll numbers of the candidate and his proposer and seconder as entered in the nomination paper are the same as those entered in the electoral rolls:
>
> Provided that the Returning Officer may—(a) permit any clerical error in the nomination paper in regard to the said names or numbers to be corrected in order to bring them into conformity with the corresponding entries in the electoral rolls; and (b) where necessary, direct that any clerical or printing error in the said entries shall be overlooked".

He argued that when the Returning Officer receives nomination papers, he has to satisfy himself about the names and electoral roll numbers and the reference to "rolls" instead of "roll" clearly suggests that the Returning Officer should have with him more than one roll. We think that in the very argument of Mr. Pardiwalla, there is a sufficient answer to his contention. The Returning Officer will have to keep with him the electoral roll of the special constituency from which he will have to verify the names and electoral numbers of the proposer and the seconder. But in case a candidate, like the petitioner, who is voter in an Assembly constituency and not a voter in the special constituency, sets out in column 7 of the nomination paper particulars of the Assembly constituency and his electoral number in that constituency, the Returning Officer will have also to keep with him the roll of that Assembly Constituency for verifying the name and electoral number of the candidate. If the candidate is, however, not entered as a voter in the roll of the particular territorial Assembly Constituency but in another Assembly Constituency, then the Returning Officer, if he has not with him the electoral roll of that constituency, can, under sub-clause (6) call upon the candidate to produce either that roll or a certified copy of an entry in such roll regarding his name and number. But when a candidate has his name in the electoral roll of the special constituency and mentions as against column 7 only the particulars of the special constituency and his electoral number in that constituency, the Returning Officer can, in a summary inquiry, upon an objection raised by another candidate or an objection on his own motion, call upon the candidate to state particulars about the Assembly constituency in which he is enrolled as a voter and then to verify the same in the manner stated above. It is to cover such cases that the word "rolls" in sub-clause (5) of Section 33 and the words "such roll" in sub-clause (6) of the same section have been designedly used. In this view of the matter, the wording of Column 7 of the nomination paper cannot be said to be either vague or ambiguous and column 7 of the nomination paper has been worded in such a comprehensive manner to cover all these cases. The question whether the omission of respondent No. 2 in not filling in column 7 of his nomination paper (Ex. 98), particulars about his number in the electoral roll of the Assembly Constituency was a failure to comply with the provisions of Section 33(1) and that the failure invalidates his nomination paper or whether the omission was of a technical defect or not a substantial character for which the Returning Officer need not have rejected the nomination paper thus presents little difficulty. We have given close consideration to what has been urged for the petitioner on this point but we are unable to hold that the omission of respondent No. 2 in giving the particulars of his number as well as the Assembly constituency roll was a defect of a substantial character requiring the Returning Officer to reject the nomination paper. We therefore find issue No. 2 against the petitioner.

11. We will deal with issues Nos. 3 and 4 together as both of them have bearing on each other. The petitioner had stated in the petition in paragraph 7(c) that the Returning Officer had erred in accepting the nomination paper of respondent No. 2 as the said respondent was not qualified to be chosen to fill the seat under the said Act in view of the fact that his name does not appear as a voter in the Assembly Electoral Roll of the Bombay State. Respondent No. 2 in his written statement (Exh. 21), had contended in para. 6 that his name does appear in the electoral roll of the Assembly constituency of the Bombay Legislative Assembly at No. 3464. On behalf of the petitioner the portion of the roll in which voters from Nasik Municipal Limits are enrolled has been produced at Ex. 75. At serial No. 3464 is the following entry:

> (3464 Sharma Shivlal Naturam (35) 533 Lonar Galli).

In the roll of the Local Authorities Constituency (Ex. 74), at the serial No. 106 the entry is as under:

(106 Nasik House No. 536 Lonar Galli—Sharma Shivlal Nenuram).

It is the contention of the petitioner that the voter whose name is mentioned at serial No. 3464 is not respondent No. 2. Respondent No. 2 has given evidence at Ex. 378 and he has examined some witnesses, including his elder brother Shivdew Nenuram Sharma (Ex. 370). There is also other evidence which shows that respondent No. 2 had been living in a house in Lonar Galli of Nasik City and that the father of respondent No. 2 and Shivdev had two names, Nanuram and Nenuram. Some post cards have also been produced showing that the name of the father of respondent No. 2 was sometimes stated as Nanuram and sometimes as Nenuram. There is also sufficient evidence to show that respondent No. 2 was living in house No. 533 in Lonar Lane. This is the house number referred to in the Assembly constituency roll mentioned above. The fact that respondent No. 2's father is described in the printed list as Naturam when it should have been Nanuram, clearly shows that there has been in this case a printing error. But the other particulars are sufficient to show the identity of respondent No. 2 with the voter at serial No. 3464. We are also satisfied that the House No. 536 in the entry at serial No. 106 in the roll (Ex. 74), is also a printing error for No. 533 and that the voter described in both these electoral rolls is respondent No. 2. It is needless to discuss the other evidence led for the petitioner on this point as also that produced on behalf of respondent No. 2. We are satisfied that the preponderance of evidence is in favour of respondent No. 2 and it does satisfactorily establish that he was a voter in the Assembly Constituency, *e.g.* the Nasik-Igatpuri Constituency.

12. In view of the finding on issue No. 3, issue No. 4 will have to be answered in the negative. Respondent No. 2 was a voter in an Assembly Constituency and therefore he was under Section 6(1) of the Representation of the People Act, 1951, qualified to be chosen as a candidate to fill a seat to the Legislative Council.

13. *Issue No.* 6.—In considering this issue, it will be necessary to notice that respondent No. 2 had in fact polled only three votes out of the total number of 192 votes actually cast at the bye-election. The position created by an improper acceptance of a nomination paper and the consequent participation of the candidate in the election is quite different from that of a candidate whose nomination paper is wrongly rejected and who is thus shut out altogether from the election. In the latter case, it is sometimes difficult to decide whether the result of the election would be materially affected by reason of the shutting out of a candidate from the election. But in a case where a candidate is wrongly allowed to contest the election, the question whether the result would be materially affected is a matter capable of being easily proved. Respondent No. 2 having polled only three votes, the only result upon the election was that the other candidates in the field had been deprived of only three votes. The difference in the votes of the petitioner and respondent No. 1 is as large as 161 (175-14). Even if the three votes polled by respondent No. 2 had been cast in favour of the petitioner, the result of the election would not at all have been affected, much less materially, as against the petitioner. The result would be that even if it is assumed that the nomination paper of respondent No. 2 had been wrongly accepted, there is absolutely no warrant for the view that the result had been materially affected by such improper acceptance of his nomination paper.

14. The next question is whether the result of the election has been materially affected by reason of the improper rejection of the nomination of Respondent No. 3. It is a significant circumstance that Respondent No. 3 has at no time made any grievance against the improper rejection of his nomination. Not only has he not joined the petitioner in making this election petition but has, though duly served with notice, failed to appear before us and complain against the improper rejection. As we shall presently show, this is an important, though not a decisive circumstance in judging whether the election has been materially affected.

Section 100(1) of the Representation of the People Act, 1951, provides that if the Tribunal is of opinion:

(a) that the election has not been a free election by reason that the corrupt practice of bribery or of undue influence has extensively prevailed at the election; or

(b) that the election has not been a free election by reason that coercion or intimidation has been exercised or resorted to by any particular community, group or section on another community, group or section, to vote or not to vote in any particular way at the election; or

(c) that the result of the election has been materially affected by the improper acceptance or rejection of any nomination,

the Tribunal shall declare the election to be wholly void.

15. We are here concerned with only the provisions of clause (c) but we have reproduced the whole sub-section (1) to compare its provisions with the rules of the Common Law of England on which strong reliance was placed by Shri Pardiwala for the petitioner. How far we can follow or take as our guide the Common Law of England in construing the provisions of an Indian statute has often laid down by the Privy Council. In *Abdul Rahim* Vs. *Abu Mahamad,* 30 Bom. L. R. 774 Lord Sinha in delivering the Judgment of the Judicial Committee observed that "it is a sound rule of interpretation to take the words of a statute as they stand and to interpret them ordinarily without any reference to the previous state of the law on the subject or the English Law upon which it may be founded". Admittedly, clause (c) referred to above is not founded on any rule of English Law. Much more therefore any reference to the Common Law of England would be irrelevant. Shri Pardiwala also argued that cases under the Ballot Act of England which embodies provisions corresponding to those of Section 100(2)(a) and (c) of the Indian Act deserve to be consulted in interpreting the clauses in question. It is to be noted, however, that the words used in Section 100 are throughout "has been materially affected", while in the English Statute the words used are "has not been materially affected". Apart from this circumstance, it has been laid down by the Privy Council in two cases arising under the Indian Income Tax Act, that decisions of the English Courts are not, as a rule, useful guides on the construction of the Indian enactment as the English and Indian Statutes are not in *pari materia.* In *Commissioner of Income Tax Bengal* V. *Shaw Wallace & Co.,* 34 Bom. L.R. 1033, Sir George Lownds observed as follows (page 1037 bottom):—

> "Again Their Lordships would disregard altogether the case law which has been so painfully evolved in the construction of the English Income Tax Statute both the cases upon which the High Court relied and the flood of other decisions which has been let loose in this Board. The Indian Act is not in *pari materia;* it is less elaborate in many ways, subject to fewer refinements, and in arrangement and language it differs greatly from the provisions with which the Courts in this country have had to deal".

Much to the same effect are the observations of Lord Macmillan in *Bijoy Singh* V. *Commissioner of Income Tax, Calcutta,* 35 Bom. L. R. 811 at page 814 (bottom):—

> "and they (Their Lordships) would further add, as they have had occasion to do more than once of late, that the invocation of the Imperial Income Tax Code and of decisions pronounced upon it are apt to be misleading in the interpretation of Indian Income Tax legislation which is framed on other and much simpler lines."

In yet another case under the same Act, *Gopal Saran* V. *Commissioner of Income Tax, Bihar,* 37 Bom. L.R. 817 Lord Russell repeated the view that little could "be gained by trying to construe an Income Tax Act of one country in the light of a decision upon the meaning of the Income Tax legislation of another".

16. These observations apply with greater force to the present case, since, as we have already pointed out, the words of the Indian Statute which have to be construed, *viz.* "has been materially affected" are not the same as the words in the English Statute. As pointed out by the Tribunal which decided the petition of Moinuddin Harris (*vide* Bombay Government Gazette 1952, Part I, page 1293) there is a material difference between the English Law with regard to elections and the law which prevails in this country on the same subject. The observations of the Tribunal are worthy of repetition:

> "Under the Indian Law if a petitioner has to bring his case within the provisions of Section 100(2) (c), mere proof of non-compliance with even the mandatory provisions of the Constitution or of the Representation of the People Act is not enough, even though such non-compliance or gross irregularity may possibly have affected the result of the election. The provisions of Section 100(2)(c) require the petitioner to prove that the result has been materially affected by such non-compliance or irregularity, while under the English Law an election tribunal would be justified in setting aside the election if it were satisfied that there was a likelihood that the result of the election may have been affected by the non-compliance or the irregularity "*vide* the decisions of the election tribunals in Malik Barkatalli *vs.* Moulvi Moharamaly Chisti and Choudhari Amarsingh *vs.* Pandit Nanak Chand cited in Hammond's Election Cases, pp. 469, 473, 219, 221 and Shrivastava's Indian Elections and Election Petitions, Vol. II, p. 214. This difference arises

from the use in Section 100 of the words "the result of the election has been materially affected" in the positive form, instead of the words "such non-compliance or mistake did not affect the result of the election" as were used in Section 13 of the Ballot Act which have now been replaced by the words "that the Act or commission did not affect its result" in Section 16(3) of the Representation of the People Act, of 1949. In framing these provisions in the negative form, the English legislature seems to have followed the practice which prevailed in applying the common law of Parliament to such matters previous to such enactments. In India, however, in spite of the fact that this material difference in the election law as prevailing in England and in this country was specifically noted by election tribunals so long ago as 1921, in the cases in which we have previously made reference, the Indian Legislature having the English legislation before it, has considered it fit to enact even the subsequent legislation by repeating the same provisions which existed in the previous Indian Legislation. The words in the positive form as used by our legislature in Section 100 are such that it is almost impossible for us without doing serious violence to the language to convert them into a negative provision, such as has existed in England, which alone would justify the onus being thrown on the respondent to show that the non-compliance with the law or the irregularities charged had not affected the result of the election. To do any such violence to the language used in Section 100 would not be in consonance with the canons of construction which have normally to be applied in the interpretation of statutes. (*Vide* Maxwell on Interpretation of Statutes, 9th Ed. p. 2—6)."

In the above case the question under Section 100(1)(c) had not arisen for decision. But as it had been elaborately argued, the Tribunal made the following observations:

"In the case of the improper rejection of a nomination it would be practically impossible for the aggrieved candidate to prove positively that the result of the election has been materially affected unless he was able and was allowed to call a very large number of persons who have actually voted to depose that they would have voted for him in such number as to cast a majority of votes on which he could have been elected. In England and in Municipal elections in Bombay the normal procedure is to declare an election void in all cases of improper rejection of a nomination as the electorate would not have had the opportunity of deciding whether to vote or not for the particular candidate by reason of the improper rejection of his nomination. As regards the improper acceptance of a nomination, if the particular candidate whose nomination is so accepted happens to secure a majority of votes, then it would be obvious that the result of the election has been materially affected; but in any other case, the same difficulty would arise in proving that the result of the election has been otherwise materially affected as in the case of the improper rejection of a nomination. Although we recognise all the difficulties that would arise in such cases, we still find it impossible to construe the clear words used by the legislature in any other manner than their normal import. If there is a defect in the legislation which calls for a remedy, it cannot be corrected by a decision of this tribunal and we must leave it to the legislature to consider whether it would not be advisable to put the law in this respect on the same footing as the law prevailing in England at present. So far as Section 100 of our Act is concerned, the way in which the relevant provisions have been framed by the Indian Legislature is such that we cannot but hold that in such cases the onus remains on the petitioner to show at least a reasonably strong likelihood of the result of the election having been materially affected by the non-compliance with the law or irregularity of which he complains as when a nomination has been improperly rejected, before he can ask the tribunal to act under that Section."

17. Shri Pardiwala has in the alternative contended that since under the Indian Statute, it is practically impossible for the petitioner to prove that the result of the election has been materially affected by the improper rejection of a nomination, the Tribunal should as a matter of course declare the election void as the English Courts do according to him under similar circumstances. In other words, he contended that the improper rejection of a nomination should *ipso facto* invalidate the election. The short answer to this argument is that the legislature has not so enacted. If it had so intended, it would have said so in express words instead of providing that the Tribunal should be satisfied that the result of the election has been materially affected by the improper rejection of a nomination. The intention of the legislature must be gathered from the words actually used in the enactment and though

the words used in the section are likely to cause hardship to the petitioner in most cases, it is not permissible to us to depart from giving effect to the plain meaning of the words.

18. In cases where the electors had no opportunity to vote at all, it may be permissible to the Tribunal to infer that the result of the election has been materially affected. In the earlier petition tried by the Election Tribunal at Nasik last year No. 252 of 1952 (*See* Bombay Government Gazette, dated 27th November, 1952, Part I, Page 6915), there was no election at all. The nominations of all the candidates except one had been rejected, with the consequence that the remaining candidate was declared elected. Having regard to the facts of that case, it was reasonable to hold that the electors had no opportunity of electing the candidate which the majority might prefer and that in the absence of such an opportunity, the result of the election had been materially affected. It would seem that no such presumption arises necessarily when an election in fact takes place. It may be that in given circumstances, such a presumption may arise but it would all depend on what the facts are in each case. Shri Pardiwala contends that the presumption should be drawn in every case, whether an election takes place or not, and that this presumption is irrebuttable. He stated that this position was implicit in the Rules of the Common Law of England but he could refer to no rule nor decision which fairly gave rise to such an implication. The lucid statement of Lord Caleridge, C.J. in *Woodward* vz. *Sarsons* (1875) 10 C.P. 733 at page 743 on the Common Law of England relating to elections contains nothing to warrant expressly or impliedly the proposition which Shri Pardiwala desires us to accept. The statement is as follows:—

> "An election is to be declared void by the common law applicable to parliamentary elections, if it was so conducted that the Tribunal which is asked to avoid it is satisfied, as matter of fact, either that there was no real electing at all, or that the election was not really conducted under the subsisting election laws. As to the first, the tribunal should be so satisfied, *i.e.*, that there was no real electing by the constituency at all, if it were proved to its satisfaction that the constituency had not in fact had a fair and free opportunity of electing the candidate which the majority might prefer. This would certainly be so, if a majority of the electors were proved to have been prevented from recording their votes effectively according to their own preferences, by general corruption or general intimidation, or by being prevented from voting by want of the machinery necessary for so voting, as, by polling stations being demolished, or not opened, or by other of the means of voting according to law not being supplied, or supplied with such errors as to render the voting by means of them void, or by fraudulent counting of votes or false declaration of numbers by a returning officer, or by other such acts or mishaps. And we think the same result should follow, if by reason of any such or similar mishaps, the Tribunal without being able to say that a majority had been prevented, should be satisfied that there was reasonable ground to believe that a majority of the electors may have been prevented from electing the candidate they preferred. But, if the tribunal should only be satisfied that certain of such mishaps had occurred, but should not be satisfied either that a majority had been, or that there was reasonable ground to believe that a majority might have been, prevented from electing the candidate they preferred, then we think that the existence of such mishaps would not entitle the tribunal to declare the election void by the common law of Parliament".

Mr. Pardiwala also referred to the decision of the Election Petitions Commission, Punjab, dated 10th March 1939, in the Multan Case No. 2, reported in Doabia's Indian Election Cases Vol. II, at page 302. There the nomination papers of the three petitioners had been wrongly rejected and the respondent was declared elected. The facts of the case were very similar to those of the first Nasik case referred to above and neither the decision nor the observations of the Commissioners are contrary to the view we have taken regarding the construction of Section 100(1) (c) of the Representation of the People Act, 1951. It was a case under the Punjab Legislative Assembly Electoral Rules and the issue No. 2 raised does not seem to be one as required by Section 7(c) of the Government of India (Provincial Elections) Corrupt Practices and Election Petitions Order, 1936, the terms of which are identical with those of Section 100(1) (c) of the

Representation of the People Act, 1951. The issue, as raised, was in these terms:

> "If so, has not the result of the election been materially affected by the improper rejection".

The observations of the Commissioners clearly show that they framed the issue on principles analogous to those of the English law. It would be useful to reproduce them, in order to make out that Shri Pardiwala cannot derive any assistance from this case:

> "The onus of this issue", the Commissioners observe, "was on the respondent and he has not produced a scintilla of evidence to discharge the burden which lay heavily upon him. If the nomination paper is improperly rejected, there is in the very nature of things, the strongest possible presumption that the result of the election has been materially affected, as no one can possibly foresee what would have been the result if that candidate had been allowed to fight the election. This view of the law is supported by the Calcutta South Case (Hammond's Election Cases, page 261) C.P.C. and I Case (*ibid* page 282) and Golaghat case (*ibid* pages 378 and 379). The presumption arising from improper rejection of nomination papers referred to "above, has not been rebutted in any way, and we hold the result of the election has been materially affected thereby".

19. It is to be noted that the observation in the last sentence negatives the contention of Shri Pardiwalla that the presumption is irrebuttable. The cases reported in Hammond's Election cases on pages 261, 282 and 378 were not under Section 7 of the Government of India Order, 1936, and in each of them there was no election at all.

20. Shri Pardiwalla then relied upon certain observations of Chief Justice Chagla in the case of *Shankar N. Karpe* vs. *The Returning Officer, Kolaba District*, 54 Bombay, L.R. 137, as laying down the proposition he was contending for. As observed by the Privy Council in *Hari Baksh* v. *Babulal* 5 Lahore 92 at page 102;

> "to understand and apply a decision of the Board or of any Court it is necessary to see what were the facts of the case in which the decision was given and what was the point to be decided".

In Shankar Karpe's case, the point which we are now considering did not arise for decision at all. The Petitioner Shankar had applied to the High Court under Article 226 of the Constitution for a writ of mandamus against the Returning Officer of the Kolaba district alleging that the Officer had wrongfully rejected his nomination paper. The sole question considered in the case was whether the High Court had power to grant the writ under Article 226 of the Constitution and it was held that the power was taken away by Article 329(b) of the same Constitution. During the argument it was urged for the petitioner Shankar that what he complained of was the violation of his right to stand as a candidate at the election to be held that that right he could assert only at that stage, that it was only the High Court that could give him relief, that the right which he would be able to assert after the election was not the same because it would not be sufficient for him to establish that his nomination was improperly rejected and that he would have further to establish that the election had been materially affected by such rejection. To this argument it would have been enough to answer that the only remedy which the petitioner could seek was under Section 100(1) (c) of the Representation of People Act, the power of the High Court to grant him any extraordinary relief being taken away by Article 329(b) of the Constitution. But the learned Chief Justice in meeting the argument of the Petitioner Shankar observed as follows:

> "I must frankly confess that I find it difficult to visualise how any tribunal can possibly come to a conclusion that when a candidate's nomination paper has been improperly rejected, it does not materially affect the result of the election. How the electors would have voted and what the result of the election would have been if the petitioner had been a candidate would be entirely a matter of speculation and no Tribunal, however well-versed in election matters, could ever decide whether the result of the election would not have been different if the petitioner had stood as a candidate. Therefore, in our opinion, whatever the case may be when a nomination paper has been improperly accepted, as far as wrongful rejection of a nomination is concerned, substantially the right of the petitioner is safeguarded under the Representation of the People Act".

21. As we have already said, the precise point we are now considering did not arise for decision. The observations referred to above do not purport to decide anything and are in any case *obiter*. Even so, we should have treated the observations as entitled to great respect and relied on them, if the circumstances of the present case had been visualised by His Lordship while making them. In this case, the person whose nomination has been rejected has made no complaint against the rejection. He has not joined the Petitioner in filing the election petition; nor has he appeared before us to say whether he supports or opposes the petitioner. The constituency consists of only 220 voters. The voters are all of them elected members of the local authorities. The respondent No. 1, who was a candidate put up by the Congress Party, secured 175 out of 192 votes validly cast. The petitioner and the other candidates had not been backed up by any party. They were independent candidates. Respondent No. 3 whose nomination was rejected was a congressman and would have had to fight against a congress candidate if his nomination had not been rejected. Respondents Nos. 4 and 5 withdrew their candidature before the election. The petitioner and the respondent No. 2 secured only 14 and 3 votes respectively. If the learned Chief Justice had visualised a case like the one before us, we think that he would have in all likelihood, mentioned it as an exception to his general remarks. In any case, we are not prepared to understand His Lordship as laying down as an inflexible rule that whenever a nomination is improperly rejected, the Tribunal must hold that the election has been materially affected. Section 100(1) of the Representation of the People Act provides that the Tribunal shall declare an election wholly void *if it is of opinion* that the result of the election has been materially affected. The words underlined by us imply that the opinion has to be formed in each case on its own facts.

22. The circumstance that the respondent No. 3 whose nomination has been rejected does not complain against the rejection is as we have already stated, material in judging whether the election has been affected. Shri Pardiwalla contends that even if he makes no grievance, any elector whose right to vote for him was affected can make a grievance. He rightly contends that every elector has an interest in the election and can file a petition complaining a wrong rejection of nomination. The petitioner has examined a witness, whose evidence (Exh. 105) does not really help him. He is a voter and did vote at the bye-election. He says that though he exercised his vote, his franchise was affected because he wanted to vote for respondent No. 3. He was a congressman but resigned from the Congress towards the end of 1950. He contested the election to Parliament in 1952 as a Socialist candidate. Respondent No. 3 was also a congressman but left the party owing to serious differences. Respondent No. 3 is however not a member of the Socialist party. The witness admits that the Socialist Party had set up candidates for all the seats assigned to the district to the Bombay Legislative Assembly but all of them had failed. Why the witness being a Socialist wanted to vote for respondent No. 3 who was not a Socialist has not been explained. He says he met the respondent No. 3 at Nasik, seven or eight days after the rejection of the latter's nomination. He did not think it necessary to tell respondent No. 3 that he should make a petition because his own right and the right of others holding his view were curtailed. He also did not think it necessary to file an election petition though his franchise was curtailed. In view of these admissions and in view of the fact that he did vote at the bye-election, his pretence that he wanted to vote for respondent No. 3 should be received with caution. A person who really wanted to vote for respondent No. 3 alone would have refrained from voting at all. The petitioner should have examined respondent No. 3 to show that he continued to be keen on contesting the election even after his nomination was rejected. The respondent No. 3 is a practising pleader at Sinnar. He was for long a congressman and must have ascertained that the voters who were over-whelmingly on the side of the Congress would not support him in sufficient numbers. It is reasonable to infer that he abandoned the idea of contesting the election. Otherwise there is no explanation why he should remain inactive and even absent at the hearing of this petition. In such a case, it cannot be said that the right of any voter has been curtailed. The voters would be in the same position as when a validly nominated candidate withdraws from the election. We have therefore reached the conclusion that when a person whose nomination has been wrongly rejected makes no protest by filing an election petition or otherwise, no inference can arise that the election has been materially affected. Shri Pardiwalla has relied on a Full Bench case reported in A.I.R. 1952 Madhya Bharat at page 97. In that case also, as in Shankar Karpe's case, the two petitioners, whose nominations had been rejected by the Returning Officer, had applied to the High Court of Madhya Bharat under Article 226 of the Constitution for a writ of mandamus, and the High Court held that its jurisdiction to entertain such an application had been taken away by

Article 329(b) of the Constitution Act. The point with which we are concerned did not arise there at all. Both the applicants were persons whose nominations had been rejected and there was no occasion for making any observation regarding a person who was not aggrieved and who had made an election petition. Incidentally, Dixit J., in his judgment made observations as follows:

> "The words 'the result of the election has been materially affected' have been used, in my opinion, to cover the cases of those election petitions where the person whose nomination paper has been improperly rejected, is himself not the petitioner and is not aggrieved by the order of the Returning Officer rejecting the nomination paper or is not interested in having the election declared void so as to enable him to stand as a candidate in a fresh election. A remedy is therefore provided to a person whose nomination paper has been improperly rejected to have the election declared void by the Special Tribunal on the ground of the improper rejection of the nomination".

23. Shri Pardiwalla relies on the first sentence, while Shri Gadgil says that the second sentence is inconsistent with the first. Probably the word "not" is not printed by mistake before the words "to cover the cases". Any way as there is no considered judgment on the point which did not arise in the case and may not have been argued at all, we are not prepared to follow the observations.

24. The discussion so far leads us to the conclusion that under the statute the petitioner has to discharge the burden of showing that the result of the election has been materially affected. He has not admittedly discharged the burden, nor has he been able to claim the benefit of any presumptions in that connection. Shri Gadgil for his client, the Respondent No. 1, however, took upon himself, as a matter of abundant caution, the task of leading evidence to show that the result has not in fact been materially affected. He has examined 126 witnesses who had voted at the bye-election and who deposed that they would not have voted for respondent No. 3. The voters in the constituency were all of them elected members of Municipalities, Local Board, and Cantonment Board of the District. Of the 220 voters in the constituency, 196 had actually voted (Ex. 107). The remaining 34 voters had not gone to the polls. No proof has been adduced that the abstainers would have voted for respondent No. 3 if he had been in the field. Out of the 192 votes validly cast, 175 were cast in favour of respondent No. 1. A great majority of these were sought to be and were actually proved to be Congressmen or "Congress-minded". Only 4 out of the 126 witnesses examined by the respondent No. 1 are not congressmen. They deposed that they were sympathisers and would not have voted for respondent No. 3. We do not propose to take into consideration the evidence of these four witnesses as it has been objected to and rightly. As for the other 122 witnesses, we were not much impressed by the objections put forward by Shri Pardiwalla. In the first place, Shri Pardiwalla contended that no statement as to the witnesses being Congressmen should have been allowed. We had allowed such statements to go in subject to the objection of the petitioner. Founding himself on certain observations in two cases reported in III O'malley and Hardcastle at pages 1 and 61, he argued that no questions regarding the political opinions were permissible. In the first case—the North Durham case—a witness was asked by the petitioner's counsel whether he belonged to the Red party. The query which the witness made, "Am I obliged to say?", Mr. Justice Grove observed:—

> "You are not obliged to say how you voted, and I think I should rule that you are not obliged to say which party you belong to, as that may be a step to the other question. If a witness is reluctant to answer this question it is not desirable to press him. No doubt the question has been allowed a great many times, and if a man holds himself out as belonging to one party, it is admissible question to ask him, but if it is a matter confined to his own mind, I do not think it has ever been allowed."

Later on, he further observed:

> "It has been asked in this sense before me whether a man ostensibly belongs to a particular party, that is admissible."

In our opinion, the case instead of being helpful to Shri Pardiwalla is directly opposed to his contention. A person who is a member of a political party can be asked whether he belongs to that party. It is only when his political opinions are confined to his own mind, that the question is inadmissible. Shri Pardiwalla asks us to interpret the word "obstensibly" in a way inconsistent with its natural meaning. He says that it is only when a person holds a high position in the party that he obstensibly belongs to that party. We are however clear that it is enough for a person to be a member of a party to enable him to hold himself

out as belonging to that party. The other case reported at page 61 of the same volume of O'malley and Hardcastle does not help Shri Pardiwalla either, as we read the report. A witness, who was a voter but had not voted, was called to prove that he had sent by the Respondent to Rotterdam on the day before the election, in order that he might not be able to vote. He was asked by Mr. Matthews for the petitioner:

"Are you a blue or yellow voter?"

Mr. Justice Lush observed:

"That will not do. Surely that is a violation of the Ballot Act, Section 12."

Mr. Pardiwalla relies strongly on this observation and contends that since Section 12 of the Ballot Act is in the same terms as Section 94 of the Representation of the People Act, 1951, we ought to interpret the section of the Indian statute in the same way as Mr. Justice Lush did. We however find it difficult to accede to Shri Pardiwalla's contention for two reasons. In the first place, the objection had been taken to a question asking a witness who had not voted at all as to what opinion he held. And when Mr. Tennant for the respondent said, referring to the North Durham case, that a voter might only be asked how he had voted in the event of his having openly avowed his political opinions, Mr. Justice Lush observed,

"That is the conclusion we come to."

We think therefore what Mr. Justice Lush actually ruled was that a witness who has voted can be asked what political opinions he obstensibly held. Secondly Mr. Pardiwalla's contention is not warranted by the wording of Section 94, which provides that no witness or other person shall be required to state *for whom he has voted at an election.* The section must be strictly construed since it curtails the right of a witness to state a fact. The prohibition in the section is directed only against a statement as to how a witness or other person *has voted* at an election. It is true that the marginal note is expressed in wider terms. But we are definitely of the view that the marginal note cannot control the meaning or widen the scope of the Section. In *Thakurain Balraj* v. *Rai Jagatpal,* 11 Bombay Law Reporter 516 (P.C.), Lord Macnaughten laid down as follows, page 524:—

> "It is well settled that marginal notes to the Sections of an Act of Parliament cannot be referred to for the purpose of construing the Act. The contrary opinion originated in a mistake and it has been exploded long ago. There seems to be no reason for giving the marginal notes in an Indian statute any greater authority than the mariginal notes in an English Act of Parliament."

Mr. Justice Rangnekar felt bound by this decision when deciding the cases reported in 39 Bombay, L.R. 203, though Maxwell laid down a contrary proposition and the decisions in India were in consonance with the conclusions set out by Maxwell. He thought that the true rule was one which was laid down by Collins M.R. in (1904) 73 L.J.K.B. 1006:—

> "The side-note, also, although it forms no part of the Section, is of some assistance, inasmuch as it shows the drift of the Section."

In *Ramkrishna* v. *Bapurao,* 40 Bombay, L.R. 390, Rangnekar and Sen, J.J., expressed the view that though it was permissible to the Court to refer to marginal notes as aids in interpretation of statutes, it had never been supposed that where a section is plain on the express language of it, the plain meaning should be curtailed by any marginal note. If as the authorities hold that we cannot travel beyond the section, we must hold that what is prohibited in the section is a statement by a witness how he voted at an election. We use the word "Prohibited" advisedly, because in an interlocutory order we stated that a witness could not even voluntarily make such a statement. The word used in the section is "required". Shri Gadgil had argued that the word meant "obliged" or "compelled" and claimed liberty for a witness to state voluntarily how he voted. There being several meanings of the word "require", we held having regard to the marginal note "secrecy of the Ballot not to be infringed", that a witness could not be permitted to state even voluntarily how he voted at an election. Some of the witnesses examind by Mr. Gadgil had stated that they had voted for respondent No. 1. The statements had been taken down subject to the petitioner's objections but were disallowed after we passed the order referred to above. In the result, then, we hold that there can be no objection under the statute to a witness stating that he belongs to a political party and that party obligations required him not to vote for a person not chosen by his party.

25. Shri Pardiwalla then contended that the claim of the witnesses that they are members of the Congress or of Congress parties in the Local Bodies should not be accepted without proof of their admission to the organisations, and he said that if we did so we would be encouraging any man in the street to say falsely that he belongs to a party. In making this contention, he did not advert to the fact that the witnesses are not men in the street but are persons who, as elected members of Municipalities and Local Boards, had a status in life. The very fact that they enjoy the confidence of hundreds and thousands of their fellowmen comes to their aid initially on the point of trustworthiness and unless we find something contrary elicited in cross-examination, we shall not be wrong in accepting their claim. In fact, in the case of most witnesses, evidence has been given which we consider sufficient to prove that they are congressmen. Applications made by several of them to the District Congress Committee to adopt them as Congress candidates for election to Municipalities and Local Boards have been produced. Chairman of the Congress parties in some Municipalities and Local Boards have given evidence to show that some of the witnesses are members of those parties. A Secretary of the Congress organisation has also produced a list of members which proves that some of the witnesses are congressmen. It is only in the case of a very few witnesses that no such evidence is given. On the whole, all the witnesses impressed us as trustworthy when they said that they belonged to or were allied with the Congress organisation or party.

26. Shri Pardiwalla also objected to reading as evidence the statements of witnesses that they would not have voted for Respondent No. 3, as he was not a Congress candidate. Such statements, he argued, were inadmissible in view of the implications of Section 94 and observations of Mr. Justice Lush in III O'malley and Hardcastle at page 63. We have already stated that the provisions of Section 94 and the observations of Mr. Justice Lush are limited in scope. We had to consider this question, at the instance of the petitioner, when Shri Gadgil stated that he would examine a large number of witnesses to prove that they would not have voted for Respondent No. 3. It was only after he satisfied us that he could lead evidence as to the state of mind of the witnesses in reference to a matter in question under Section 14 of the Evidence Act read with Explanation I thereof and that neither the case in III O'malley and Hardcastle nor Section 94 of the Representation of the People Act, 1951, precluded him from leading such evidence that we refused to make an order under Section 90(2), second proviso. We adhere to the opinion we then formed and hold that the evidence objected to by Shri Pardiwalla is relevant and admissible. The only question now to be decided is whether the witnesses can be believed when they say that they would not have voted for Respondent No. 3. Shri Pardiwalla suggested that the ballot system made it possible for a member of a party not to vote for a candidate of that party and that conceivably there might be many cases of disloyalty to the party. He therefore asked us not to attach any value to that evidence, as there was no certainty whether they would not have voted for respondent No. 3. It is true that when a witness who has not voted says that he would have voted or would not have voted for a particular candidate, his evidence may not be taken at its face value. Here the facts are different. The witnesses say that they were under party obligations and that they had actually voted. There is therefore no reason why we should not accept their word as to the existence of their state of mind on the election day. It is after all a matter of appreciation of evidence and in view of the fact that their evidence is corroborated by the number of votes secured by respondent No. 1 coupled with the fact that respondent No. 3 had abandoned the idea of contesting the election, it would be reasonable to hold that the 122 witnesses of the respondent No. 1 would not have voted for respondent No. 3. In other words, respondent No. 3 would not have been able to secure the majority of votes.

27. In the result we have to hold that not only has the petitioner failed to prove that the result of the election has been materially affected by reason of the improper rejection of respondent No. 3's nomination but that the respondent No. 1 has proved, though this burden is not on him, that the result of the election has not been materially affected. The petition therefore deserves to be dismissed.

28. In awarding costs, we take into account the fact that the petitioner had reasonable grounds for seeking a decision on the question whether the improper rejection of a nomination *ipso facto* invalidated the election subsequently held. The observations in A.I.R. 1952 Madhya Bharat 97 and 54 Bom. L.R. 137, though *obiter*, were calculated to encourage the petitioner to believe that he had an arguable case. It is true that the respondent No. 1 has had, for no fault of his, to undergo the worry and expense of the longdrawn trial of this petition. Nevertheless, we think that it would not be proper to saddle the petitioner with the costs

of respondent No. 1. The case of respondent No. 2 stands on a different footing. The petitioner has failed to prove that his nomination was improperly accepted. The identity of his name and the validity of the entry in the roll of the Bombay Legislative Assembly constituency had been attacked and he had therefore to defend a matter of vital importance to him. We consider that he is entitled to his costs and we direct that the petitioner do pay to respondent No. 2 Rs. 150 as his costs.

ORDER

The petition is dismissed. The petitioner do pay Rs. 150 to respondent No. 2 as his costs. The petitioner and respondent No. 1 do bear their own costs.

*The 14th December* 1953.

(Sd.) V. A. NAIK, *Chairman.*

(Sd.) R. D. SHINDE, *Member.*

(Sd.) G. P. MURDESHWAR, *Member.*

*The 14th December*, 1953.

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[No. 82/2/53/9133.]

By Order,

P. R. KRISHNAMURTHY, Asstt. Secy.

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